UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BOGOPA SERVICES CORPORATION
D/B/A FOOD BAZAAR
Employer

and Case Nos. 29-RC-10195 and
29-RC-10198

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 342, AFL-CIO
Petitioner

and

LOCAL 890, LEAGUE OF INTERNATIONAL
FEDERATED EMPLOYEES
Intervenor

SUPPLEMENTAL DECISION ON OBJECTIONS AND NOTICE OF HEARING

Upon petitions filed on April 13 and 14, 2004,[1] by United Food and Commercial Workers Union, Local 342, AFL-CIO, herein called the Petitioner or Local 342, upon which Local 890, League of International Federated Employees, herein called the Intervenor or Local 890, intervened based on its collective bargaining relationship with Bogopa Services Corporation d/b/a Food Bazaar, herein called the Employer, and pursuant to a Decision and Direction of Election issued by the Regional Director for Region 29 on April 29, an election by secret ballot was conducted on May 22, among the employees in the following unit:

> All full-time and regular part-time employees employed by the Employer at the following stores: 238 161st Street, Bronx, New York; 97-27 57th Avenue, Corona, New York and 17-59 Ridgewood Place, Brooklyn, New York, but excluding all assistant store managers, store managers, seasonal and/or temporary employees, office clericals, guards, supervisors as defined in Section 2(11) of the Act, and the meat, deli and fish department

[1] All dates hereinafter are in 2004 unless otherwise indicated.

employees at the 97-27 57th Avenue, Corona, New York, and 17-59 Ridgewood Place, Brooklyn, New York, facilities.

The Tally of Ballots made available to the parties at the conclusion of the election pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	252
Number of void ballots	1
Number of ballots cast for Local 342	132
Number of ballots cast for Local 890	69
Number of votes cast against participating labor organizations	4
Number of valid votes counted	205
Number of challenged ballots	4
Number of valid votes counted plus challenged ballots	209

Challenges are not sufficient in number to affect the results of the election.

Thereafter, on May 28, Local 890 filed timely objections to conduct affecting the results of the election. Local 890's objections are attached hereto as Exhibit "A."

Pursuant to Section 102.69 of the Board's Rules and Regulations, the Regional Director for Region 29 caused an investigation to be conducted concerning the above-mentioned objections, during which the parties were afforded full opportunity to submit evidence bearing on the issues. The undersigned also caused an independent investigation to be conducted. The investigation revealed the following:

The Employer, a domestic corporation, with its principal office and place of business located at 650 Fountain Avenue, Brooklyn, is engaged in the operation of supermarkets at various locations including 238 161st Street, Bronx, New York; 97-27 57th Avenue, Corona, New York and 17-59 Ridgewood Place, Brooklyn, New York, herein referred to as the Employer's Bronx, Corona and Brooklyn stores.

THE OBJECTIONS

Objection Nos. 1(a) through (d), 2, 3, 4 and 5:

In these objections, Local 890 contends essentially that the Employer improperly assisted the Petitioner by (1) granting access to private employee areas in violation of the Employer's no solicitation rule;[2] (2) permitting access to employees and work stations;[3] (3) meeting privately with representatives of Local 342 to discuss terms and conditions of employment;[4] (4) conducting a card count with representatives of Local 342 despite Board certification of Local 890;[5] and (5) distributing campaign literature for Local 342 to eligible voters at their work stations and telling employees that they would lose their jobs if they did not vote for Local 342.[6] The Employer denies that it engaged in objectionable conduct. Local 342 contends that these objections lack merit. For the reasons discussed herein, I direct that a hearing be held on Objection Nos. 1(a), 1(b), 2, 3, 4 and 5 and I overrule Objection Nos. 1(c) and 1(d).

The independent investigation revealed that an unfair labor practice charge in Case No. 29-CA-26245 was filed by Local 890 on April 19. The allegations of the charge in Case No. 29-CA-26245 are almost identical to the allegations contained in Objection Nos. 1(a) through 1(d).[7] On May 10, the Regional Director refused to issue a complaint in Case No. 29-CA-26245 and

[2] Objection No. 1(a).
[3] Objection No. 1(b).
[4] Objection No. 1(c).
[5] Objection No. 1(d).
[6] Objection Nos. 2 through 5.
[7] More specifically, the charge alleges that, "From and after March 21, 2004 and continuing to date, the Employer has improperly supported Local 342-50 UFCW in an attempt to organize employees represented by Charging Party in granting access to private employee areas in violation of the Employer's no solicitation rule, in permitting access to employees and work stations, in meeting privately with representatives of Local 342-50 to discuss terms and conditions of employment and in conducting a card count with representatives of Local 342-50 despite the fact that Charging Party is the certified representative of the employees in question. Such action has permitted and allowed Local 342-50 to obtain authorization cards from such coerced employees. Said cards have been used to improperly support Local 342-50 representation petitions in Case No[s.] 29-RC-10195 and 29-RC-10198."

dismissed the allegations of the charge. The May 10 dismissal letter sent to Local 890 states, *inter alia*, that:

> *Decision to Dismiss:* Based on the investigation, I have concluded that further proceedings are not warranted, and I am dismissing the charge for the following reasons:
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> The charge alleges that the Employer violated Sections 8(a)(1), (2), (3) and (5) of the Act by granting access to its facilities and support to Local 342, United Food and Commercial Workers, AFL-CIO, herein called Local 342, by conducting a card count with Local 342 and by engaging in negotiations with Local 342. The investigation found that during the Spring 2004, Local 342 engaged in an organizing campaign that included employees represented by Local 890 at the Employer's Bronx, New York grocery store. During the course of this organizing campaign, the evidence shows that representatives from Local 342 solicited authorization cards and campaigned at the Bronx store in customer areas and at times in the employees' break room. There was no evidence that any Local 890 agents were denied access to the Bronx store or that any of the Employer's supervisors solicited cards for Local 342. The investigation further shows that upon the request of Local 342, the Employer submitted to a card count check by an arbitrator but thereafter the Employer declined to recognize Local 342. Although the Employer contends Local 342 agents did not seek its permission prior to entering the Bronx store, an employer may grant access to its place of business to allow a labor union to organize its employees. In these circumstances, where there is no evidence that the Employer assisted Local 342 in any manner and it did not prohibit Local 890 access to its facility, dismissal is warranted.
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> In the absence of evidence that the Employer violated the Act in any other manner encompassed by the instant charge, I am refusing to issue a complaint in this matter.

The period for filing an appeal to the foregoing dismissal ended May 24. No appeal was filed within the time period provided.

In support of Objection No. 1, Local 890 relies upon evidence submitted in connection with the unfair labor practice charge it filed in Case No. 29-CA-26245, described above. In this regard, the evidence submitted during the investigation of the unfair labor practice charge shows that "no solicitation" signs were posted at the Employer's Bronx, Corona and Brooklyn stores; and, that on about February 27, the Employer told Local 890 that it was going to prohibit access

to Local 890 and Local 342 for organizational purposes. Despite such prohibition, Local 890's evidence submitted in support of the unfair labor practice charge in Case No. 29-CA-26245 shows that before and during the critical period, Local 342 campaigned in the Employer's Bronx store. In this regard, three employee witnesses testified during the investigation of the unfair labor practice charge in Case No. 29-CA-26245. Their testimony tends to show that Local 342 agents were in the Bronx store repeatedly during the critical period and that Assistant Manager Mujib, although advised of the Local 342 agents' presence in the store, did not ask the Local 342 agents to leave. However, one of the witnesses testified that on one occasion, after s/he told Store Manager Joe Kim that Local 342 agents were in the store, s/he saw the store manager go to the Local 342 agents and then the Local 342 agents left. Finally, although Local 890's evidence shows that on dates before and during the critical period, it complained to the Employer regarding Local 342's campaigning in violation of the Employer's "no solicitation rule," there is no evidence that Local 890 requested and was denied access to the Employer's Bronx store.

Additionally, in support of Objections 1(a) and 1(b), concerning the Employer granting access to Local 342, Local 890 submitted prepared statements of two employee witnesses, wherein one employee states that on unspecified date[s], employees complained to the Employer that they did not want to be bothered by the Local 342 agents in the store; the Employer did nothing and encouraged employees to talk to the Local 342 agents. The second employee states that on unspecified dates prior to May 22 (the day of the election), s/he escorted Local 342 agents out of the store and managers Richard Kim and Mujiph Mohammad told him/her to leave them alone because the boss wanted Local 342 in the store.[8]

[8] I note that this employee also provided a sworn statement in the investigation of the unfair labor practice charge mentioned above. During the investigation of the unfair labor practice charge in Case No. 29-CA-26245, this witness essentially testified that in the end of February, s/he saw 3 nonemployees in the non-customer area of the meat department giving out Local 342 flyers. After telling the nonemployees to leave, the employee reported the

With regard to Objection Nos. 1(c) and 1(d), which allege that, from and after March 21, the Employer met privately with Local 342 to discuss terms and conditions of employment and conducted a card count, Local 890 names Local 890 Business Agent Ted Papahatzis and five employees as witnesses in support of said objections without providing details as to what the witnesses would testify about. However, one of the aforementioned employee witnesses testified in the investigation of the unfair labor practice charge in Case No. 29-CA-26245 that on about April 1, when a Local 342 agent asked him/her to sign a card for Local 342, the Local 342 agent told the employee that Local 342 was bargaining with the Employer. Further, during the investigation of the unfair labor practice charge, it was revealed that on April 12, an arbitrator issued a certification of majority status pursuant to an in camera inspection of authorization cards furnished by Local 342. Finally, Local 890 provided documentary evidence consisting of a Local 342 leaflet entitled "An Important Message to Bogopa Workers, From: UFCW Local 342," essentially stating that on April 12, Local 342 was able to prove its majority status but that the Employer had not yet recognized Local 342.[9] Local 890 did not provide any details as to how or when this leaflet was distributed.

As noted above, the Employer denies engaging in objectionable conduct as alleged in Objection Nos. 1(a) through 1(d). In this regard, the Employer admits that a neutral arbitrator conducted a card count but that the Employer has not granted Local 342 recognition. Further, the Employer's attorney contends that the company maintained a neutral position; that it had

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incident to assistant manager Mujib, who told the employee to forget about it. The employee later saw the 3 nonemployees in the employee break room sitting by themselves. The employee told them they should not be there and that they should leave; they did not leave. Assistant Manager Mujib told the employee to leave the nonemployees alone. Although the above incident occurred prior to the critical period, the employee witness testified that thereafter, s/he saw Local 342 business agents on a daily basis in the Employer's Bronx store, and Assistant Manager Mujib did not ask the Local 342 agents to leave.

[9] The leaflet is attached as Exhibit "B."

conversations with both unions concerning access to its facility; that it allowed Local 890 access to service its contracts but told both unions to campaign outside.

As noted above, Local 342 contends that Objection Nos. 1 (a) through (d) do not have merit. More specifically, Local 342 contends that Local 890 made the same allegations in its unfair labor practice charge against the Employer in Case No. 29-CA-26245; that the Region fully investigated the charge in Case No. 29-CA-26245 and found it to be without merit. Local 342 contends that Objection Nos. 1(a) through (d) fail for the reasons stated in the Region's May 10 letter dismissing the charge.

In support of Objection No. 2, contending that from about May 7 and thereafter, the Employer's district manager distributed campaign literature for Local 342 and threatened employees with loss of jobs, Local 890 provided an offer of proof summarizing the testimony of three employee witnesses. Local 890 contends that the employee witnesses will testify that the district manager distributed campaign literature for Local 342 to eligible voters at their work stations, told them that the "boss wants" them to vote for Local 342 and that they would be out of jobs if they did not vote for Local 342. Local 890 also submitted prepared statements signed by two of the aforementioned employee witnesses. Only one of the statements addresses the allegation concerning District Manager Negron. In this statement, the employee witness essentially states that on or about May 7, District Manager Ray Negron met with Local 342 delegates Luis and Carolina outside the Employer's Bronx facility and they gave Negron Local 342 flyers. District Manager Negron then went in the store and handed the Local 342 flyers to employees and told the employees that they must vote for Local 342. The employee witness also specifically states that District Manager Negron told him/her that the employees must vote for Local 342, because that is what the boss wants, or employees will be without a job.

In support of Objection No. 3, essentially contending that on or about May 21 and 22, prior to the election, Bronx Store Manager Joe Kim, illegally assisted Local 342 and threatened employees, Local 890 submitted an offer of proof summarizing the testimony of two employee witnesses. Local 890 contends that the witnesses would testify that Bronx Store Manager Kim told employees that they should vote for Local 342 because the "boss wanted it" and if they did not, they would lose their jobs. Local 890 also submitted a prepared statement signed by one of the employee witnesses. The employee witness essentially states that on or about May 21, Store Manager Joe Kim asked the employee why s/he was giving Local 342 a hard time; that the employee witness should help them because that is what the boss wants and asked if the employee wanted to continue working there.

In support of Objection Nos. 4 and 5, essentially contending that on or about May 21 and 22, Night Store Managers Richard Kim, Jun Lee and Jae Kwan Kim, illegally assisted Local 342 and threatened employees, Local 890 submitted an offer of proof summarizing the testimony of six employee witnesses. In support of Objection No. 4, Local 890 contends that three employee witnesses will testify that Bronx Night Store Manager Richard Kim told employees that they should vote for Local 342 because the "boss wanted it" and if they did not, they would lose their jobs. In support of Objection No. 5, Local 890 contends that three witnesses will testify that Brooklyn Night Store Managers Jun Lee and Kwan Kim told eligible voters that the "boss wanted Local 342" and to vote for Local 342 or they would lose their jobs. Local 890 also contends that these witnesses will testify that Managers Lee and Kim told employees that they must talk to Local 342 organizers who were then granted access to the store.

As noted above, the Employer generally denies that it engaged in the conduct alleged in Objection Nos. 2, 3, 4 and 5.

As noted above, Local 342 contends that Objection Nos. 2, 3, 4 and 5 lack merit. More specifically, Local 342 states that in the pre-election period, employees informed Local 342 that Employer representatives were telling them to vote for Local 890. Local 342 brought these allegations to the attention of Employer counsel, Shaun Reid, who assured Local 342 that the Employer representatives would be instructed of their legal obligation to remain neutral in the election and not to express any sentiment for one union or the other. Local 342 suggests that the claimed objectionable conduct was Employer representatives' statements urging employee support for Local 890, not Local 342.

The Board has held that in a multiunion representation election, an employer may state its preference for one of two competing unions, provided that such statements of preference are not accompanied by threats of reprisals or promises of benefits. See, *Amboy Care Center*, 322 NLRB 207 (1996); *Rold Gold of California, Incorporated*, 123 NLRB 285 (1959); *Stewart-Warner Corporation*, 102 NLRB 1153, 1157 (1953).

Further, a no-solicitation, no-distribution rule may lawfully be used to limit the access of nonemployee organizers to employees as long as it is applied in a nondiscriminatory manner and the union has other reasonable means of communication with employees. *NLRB v. Babcock & Wilcox Company*, 351 U.S. 105 (1956); *St. Francis Hospital*, 263 NLRB 834, 835 (1982). Where a question concerning representation exists, granting one union access to company property to conduct organizing activities during work time while denying access to another union has been found to be an unfair labor practice. *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993). In determining whether such conduct is prejudicial to the conduct of a free election, the Board considers whether the denial of equality in one of the available means of communication created such an imbalance as would warrant setting aside the election. See, *X-*

Ray Manufacturing, 143 NLRB 247 (1963). See also *NLRB v. Steelworkers (Nutone, Inc.)*, 357 U.S. 357 (1958). The Board has held that if an employer grants access to one union, it is not obligated to seek out the competing union and offer the same arrangement regarding access. *Detroit Medical Center Corporation*, 331 NLRB 878 (2000). Generally, in the absence of the competing union's request for the same arrangement regarding access to engage in organizational activities on the employer's property, there is no objectionable denial of access. See, *Detroit Medical Center Corporation*, 331 NLRB 878 (2000)(where the Board declined to set aside an election, holding that an employer, in allowing one union to conduct meetings on its premises, has no obligation to notify the party with competing interests that it has granted such request, nor is it obligated to offer the competing union something it had not requested.) Compare, *Lake City Foundry Co.*, 173 NLRB 1081, 1089 (1968), enf. denied 432 F.2d 1162 (7th Cir. 1972) (where an employer allowed one of two competing unions to conduct organizing meetings on company premises during company time, and the second union did not request access, in an atmosphere of numerous unfair labor practices and other objectionable conduct, the Board set aside the election.)

With respect to Objection Nos. 1 (a) and 1(b), regarding the Employer granting access to Local 342 for organizational purposes in violation of its no solicitation rule, Local 890's evidence shows that "no solicitation" signs are posted at the Employer's Bronx, Corona and Brooklyn stores; and, that in February, the Employer told Local 890 that it was going to prohibit access to Local 890 and Local 342 for organizational purposes. Despite such prohibition, Local 890's evidence indicates that during the critical period, Local 342 campaigned in the Employer's

Bronx and Brooklyn stores;[10] and, that the Employer permitted and in some cases, even promoted Local 342's campaigning on its premises. In this regard, Local 890's evidence indicates that Assistant Manager Mujib did nothing to stop this activity when advised by employees that Local 342 was "bothering" them in the store. Additionally, Local 890's evidence indicates that, in the context of a statement to employees to vote for Local 342 or they would lose their jobs, Managers Lee and Kim told employees that they must talk to Local 342 organizers who were then granted access to the Brooklyn store.[11] This additional evidence, not presented or considered in the unfair labor practice charge in Case No. 29-CA-26245, tends to show that the Employer permitted disparate access and threatened employees that they must speak to Local 342 organizers. Such conduct, if true and occurring within the critical period, would, in my view, be grounds for setting aside the election.[12] Accordingly, I find that there are substantial and material issues, including issues of credibility, which would best be resolved at hearing. Compare *Gem International v. NLRB*, 321 F.2d 626 (1963) (the court found no disparate treatment between unions where employer enforced an otherwise valid no solicitation/no distribution rule against union 770 but granted union 655 permission to solicit on the premises inasmuch as union 770 made no request for permission to solicit.)[13]

[10] As noted above, in support of Objection 5, Local 890 contends that employee witnesses will testify that on May 21 and 22, Managers of the Employer's Brooklyn store, Jun Lee and Jae Kwan Kim, told employees that they must talk to Local 342 organizers who were granted access to the store at that time. Local 342 does represent certain classifications of employees working in the Brooklyn store; however, the alleged context in which the statement was made, i.e., after the managers told the employees to vote for Local 342 or they would lose their jobs, tends to show that Local 342 was there to campaign rather than to administer its contract. This evidence was not presented in the investigation of the unfair labor practice charge in Case No. 29-CA-26245.

[11] This evidence was not presented in support of Local 890's unfair labor practice charge in Case No. 29-CA-26245.

[12] I note that the parties apparently dispute whether Local 890 engaged in campaigning on the Employer's premises. In this regard, evidence from the unfair labor practice investigation reveals that, Local 342 complained to the Employer that, on unspecified dates, Local 890 was engaging in organizational activities in the Bronx and Brooklyn stores; however, the evidence also shows that Local 890's attorney denied such claim.

[13] Here, Local 890 does not claim that it requested and was denied access to the Employer's property for the purposes of campaigning or that it was denied access to its members. Regarding access to its members, Local 890's

With respect to Objection No. 1(c), Local 890's asserts that its witnesses would testify that "from and after March 21," the Employer met privately with representatives of Local 342 to discuss terms and conditions of employment. Local 890's evidence also shows that on April 1, a Local 342 agent told an employee witness that it was bargaining with the Employer. Finally, Local 890 submitted a copy of a Local 342 leaflet with no further explanation. I note that the leaflet, if distributed to employees, could tend to undercut an assertion by Local 342 that it was bargaining with the Employer, inasmuch as the leaflet states that the Employer has not recognized Local 342 yet and that Local 342 would inform employees as soon as the Employer tells Local 342 that it is agreeing to recognize Local 342 as the bargaining unit representative. I find that the Local 342 leaflet is merely a claim of majority status in the context of Local 342's campaign.[14] The Local 342 leaflet may be inartfully phrased, but the message is clear that the Employer had not yet recognized Local 342. Further, the unfair labor practice charge in Case No. 29-CA-26245, alleging, in part, that the Employer's actions permitted Local 342 to obtain authorization cards from coerced employees, was not found to have merit, and there is no specific evidence concerning the distribution of the leaflet. Moreover, even if the leaflet disseminated an inaccurate message that the Employer was meeting with Local 342 to discuss terms and conditions of employment, the Board will not probe into the truth or falsity of the parties' campaign statements, and will not set elections aside on the basis of misleading campaign statements. See *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). In these circumstances, and where the Regional Director refused to issue a complaint in Case Nos. 29-CA- 26245, which alleged that the Employer violated the Act by engaging in negotiations with

evidence submitted in support of the unfair labor practice charge in Case No. 29-CA-26245 shows that Local 890 admits that it held membership meetings in the Bronx store to discuss medical and fund issues.

[14] Indeed, the leaflet states the results of the card check, noting that the Employer has not yet recognized Local 342.

Local 342, and there is no evidence that the conduct alleged occurred within the critical period, I find no merit to Objection No. 1(c). In light of the foregoing, and since there are no substantial and material issues warranting a hearing, I overrule Objection No. 1(c).

With respect to Objection 1(d), Local 890's evidence shows that on April 12, an arbitrator conducted a card count. Thus, there is no specific evidence that the above conduct by the Employer occurred on or after April 13, the date the first representation petition was filed in this case. Accordingly, Local 890 has not presented any evidence that the Employer engaged in the aforementioned alleged misconduct during the critical period, and, under the Board's long-standing *Ideal Electric* rule, 134 NLRB 1275 (1961), such misconduct cannot serve as a basis to set aside the election. See also, *Dollar Rent-A-Car*, 314 NLRB 1089 fn. 4 (1994)(the Board requires a specific showing that the conduct occurred during the critical period.) In these circumstances, where the Regional Director refused to issue a complaint in Case Nos. 29-CA-26245, which alleged that the Employer violated the Act by engaging in negotiations with Local 342, and there is no evidence that the conduct alleged occurred within the critical period, I find no merit to this objection. Accordingly, I overrule Objection No. 1(d).

With respect to Objection Nos. 2, 3, 4 and 5, related to threats by the Employer's managers, Local 890's evidence shows that on about May 7, the Employer's District Manager distributed Local 342 literature. I do not regard an employer's distribution of literature in favor of one of two competing unions, standing alone, as impermissible where there is no showing that the other union requested and was denied the same privilege or that such rule diminished the ability of the other union to carry its message to employees. See, e.g. *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956) (an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels

of communication will enable it to reach employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.) See, also, *NLRB v. United Steelworkers of America, CIO, (Nutone, Incorporated),* 357 U.S. 357 (1958) (no solicitation, no distribution rules are not binding on employers); *St. Francis Hospital*, 263 NLRB 834, 835 (1982) (where the Board found that an employer has not unlawfully enforced its no solicitation no distribution rule in a disparate manner when it campaigns against a union even though nonemployee organizers may not do so.) Accordingly, I overrule this aspect of Objection No. 2.

With regard to the remaining aspect of Objection No. 2, and Objections 3 through 5 pertaining to the alleged threats, Local 890's evidence shows that employees were essentially told that they should vote for Local 342 and if they did not, they would lose their jobs. More specifically, the evidence shows that during the critical period, District Manager Negron told employees that they must vote for Local 342, because that is what the boss wants, or employees will be without a job (Objection No. 2); Bronx Store Manager Kim told employees that they should vote for Local 342 because the "boss wanted it" and if they did not, they would lose their jobs and/or asked whether they wanted to continue working for the Employer (Objection No. 3); Bronx Night Store Manager Richard Kim told employees that they should vote for Local 342 because the "boss wanted it" and if they did not, they would lose their jobs (Objection No. 4): and, that Brooklyn Night Store Managers Jun Lee and Kwan Kim told eligible voters that the "boss wanted Local 342" and to vote for Local 342 or they would lose their jobs (Objection No. 5). Such conduct, if true and occurring within the critical period, in my view, could warrant setting aside the election. See e.g. *Community Action Commission of Fayette County, Inc.*, 338 NLRB No. 79 (2002) (election set aside where employer threatened employees that they would

lose their jobs if the union won the election); *Sol Henkind, an Individual d/b/a Greenpark Care Center*, 236 NLRB 683 (1978) (where the employer's comptroller threatened to discharge an employee if she did not vote for one of the competing unions, the Board set aside the election, noting that the presumption of repetition among employees was appropriate in light of the comptroller's later order to the employee to spread the word to other employees.) Compare *R.L. White Co., Inc.*, 262 NLRB 575 (1982) (where the Board found that a supervisor's statements to employees "we want you to vote 'no,' the company wants you to vote 'no,' I want you to vote "no," were not objectionable or coercive.) Accordingly, I find that Objection Nos. 2, 3, 4 and 5 raise substantial and material issues, including issues of fact and credibility that would best be resolved by a hearing. Therefore, I direct that a hearing be held concerning the alleged threats encompassed by Objection Nos. 2, 3, 4 and 5.

Objection No. 6:

In this objection, Local 890 contends essentially that during the critical period, the Employer showed a preference for Local 342 and interfered with the contractual rights of Local 890 by failing to process grievances or pay back wage claims filed by Local 890 but distributing back pay in cash to Local 342 butchers on May 15 in front of eligible voters. The Employer denies engaging in objectionable conduct. Local 342 contends that this objection lacks merit. For the reasons noted herein, I overrule objection.

In support of this objection, Local 890 submitted an offer of proof summarizing the testimony of its business agent, Ted Papahatzis. Local 890 contends that Papahatzis will testify "to the circumstances." Local 890 asserts that the failure to process grievances shows favoritism

and constitutes a violation of the Act.[15] Local 890 did not provide any details regarding the grievances or any evidence that employees represented by it were entitled to a wage increase and did not receive it.

As noted above, the Employer denies engaging in objectionable conduct. The Employer admits that on May 15, backpay was paid to certain Local 342 members in the meat department representing their annual contractual wage adjustment. The Employer's attorney verbally states that although the wage increase was due on April 1, such increases are generally late due to administrative reasons and the delay had nothing to do with organizing activities taking place.

Local 342 contends that this objection lacks merit. More specifically, Local 342 contends that under the collective bargaining agreement for the unit employees of the Brooklyn store, the Employer was obligated to pay a wage increase effective April 1; that because the Employer did not pay that increase when due, Local 342 grieved. Local 342 contends that only when it threatened to strike over the issue, the Employer paid that wage increase retroactively, to the affected meat department employees. Local 342 contends that because the meat department employees were excluded from the unit in which the election was held, the corrective payments had no connection to the employees who voted in the election. With regard to Local 890 pointing to the cash nature of the payment, Local 342 contends that the Employer cashes the paychecks of all employees, every pay period, including the checks of employees represented by Local 890, and that all employees are paid in cash in the stores.

Here, the evidence shows that on May 15, the Employer paid meat department employees money to which they were entitled under the contract with Local 342. There is no evidence that

[15] Although Local 890 asserts that this is a violation of the Act, it did not provide evidence with respect to this issue during the investigation of the charge in Case No. 29-CA-26245, nor is this allegation the subject of a charge filed by Local 890 against the Employer.

any employee was entitled to a wage increase due under the contract between Local 890 and the Employer but that they did not receive it. Accordingly, there is no evidence of Employer favoritism with respect to the processing of grievances and I overrule Objection No. 6.

Objection No. 7:

In this objection, Local 890 contends essentially that on May 21 and 22, Local 342 threatened employees that the Employer would fire them if they did not vote for Local 342. Local 342 denies engaging in such conduct. The Employer generally denies the allegations contained in this objection. For the reasons discussed herein, I direct that a hearing be held on this objection.

In support of this objection, Local 890 submitted an offer of proof naming six employee witnesses that it contends will testify in support of this objection, that on May 21 and 22, Local 342 threatened employees that the Employer would fire them if they did not vote for Local 342. Local 890 also submitted prepared statements signed by two of the aforementioned employee witnesses. Only one of the statements addresses the allegation concerning a threat by Local 342. In this statement, the employee witness essentially states that on or about May 22, Local 342 delegate "Luis" told the employee witness, among other things,[16] that he would see that the employee witness gets fired and that s/he never works anywhere again.

As noted above, the Employer and Local 342 deny the allegations contained in this objection. More specifically, Local 342 contends that Local 342 does not employ a representative named Luis. Local 342 admits that Louis LoIacono is Local 342's Organizing Director; however, he does not speak Spanish and had no direct communication with the

[16] See Objection No. 8 below.

Employer's employees. Local 342 also contends that it has no authority to affect the discharge of employees, as employees well know. Further, Local 342 contends that it has at least two witnesses who will attest to bribes made to them by Local 890 in the context of the election. More specifically, Local 342 contends that on or about May 20 or 21, Local 890 representative Dina Mongiono[17] (1) paid an employee $250 to wear a Local 890 T-shirt and to campaign for Local 890; and, (2) promised another employee a cash payment if he were to circulate a petition signed by employees stating that they did not want Local 342 as their bargaining representative.

Here, Local 890's evidence shows that Local 342 threatened employees that the Employer would fire them if they did not vote for Local 342. Such conduct, if true and occurring within the critical period, in my view, could warrant setting aside the election. See e.g., *Baja's Place, Inc.*, 268 NLRB 868 (1984) (where threat by union agent to get employee's job was found objectionable.)

Accordingly, I find that this objection raises substantial and material issues, including issues of fact and credibility that would best be resolved by a hearing. Therefore, I direct that a hearing be held concerning the alleged threats made by Local 342, encompassed by Objection No. 7.

Objection Nos. 8 and 9:

In these objections, Local 890 contends essentially that Local 342 paid employees between $10 and $50 to vote for Local 342 and that the Employer distributed copies of the work schedule for the Bronx Concourse location to Local 342 when Local 342 had no contractual right to such schedule. Local 342 denies engaging in objectionable conduct. The Employer contends

[17] Local 342 states that this is a phonetic spelling.

that these objections lack merit. For the reasons set forth herein, I direct that a hearing be held concerning Objection No. 8 and that Objection No. 9 be overruled.

In support of these objections, Local 890 submitted prepared statements of two employee witnesses, wherein one employee states that on May 21, Local 342 representatives Carolina and Luis were in front of the Employer's Bronx store. The representatives said they made copies of a list given to them and all their plans were going forward because everyone had their hands out looking to get paid to vote. Luis dropped one set of these papers, which the employee witness picked up. The papers show employee work schedules and notations next to each name, i.e., yes or no and a dollar amount, either $10 or $50. The employee witness contends that the papers were pages of a work schedule that is only held by managers and posted in the store. The employee witness states that s/he went in the store and the work schedule was still there. The second employee states that on about May 21, Local 342 business agent Carolina told him/her that she would give him/her a T-shirt, a hat and ten dollars if s/he voted for Local 342. On May 22, the day of the election, Local 342 business agent told the employee witness that he would give the employee witness $50 if s/he voted for Local 342.

As noted above, the Employer contends that these objections lack merit. Further, the Employer denies providing the work schedule to Local 342. The Employer's attorney verbally states that the work schedule is posted in a public area near the first cash register; that it could have been photocopied and put back.

The Board and the courts have recognized that a union's promising or conferring benefits may unduly influence the free choice of voting employees in representation elections.[18] In

[18] See, e.g. *NLRB v. Savair Mfg. Corp*., 414 U.S. 270 (1973) (where a union's preelection offer to waive initiation fees to employees who agreed to sign union recognition slips as a show of preelection support constituted an impermissible inducement.)

evaluating whether certain campaign tactics constitute objectionable conduct, the Board has generally applied an objective standard in accord with the "tendency-to-influence test." *Gulf States Canners, Inc*., 242 NLRB 1326 (1979). In this regard, the Board has applied a totality of the circumstances approach, which in addition to the value of the benefit conferred in relation to the stated purpose for granting it, takes into account various other factors, such as timing of the benefit, the number of employees to whom the benefit is granted, and the likelihood of the benefit being interpreted as a reward or inducement to vote for the union. See *Owens-Illinois, Inc.*, 271 NLRB 1235 (1984); *B & D Plastics*, 302 NLRB 245 (1991).

The mere fact that a payment in cash or kind has been made to an eligible voter during a preelection campaign does not require a per se finding that the employee's right to make a free and uncoerced choice of a bargaining representative has been destroyed.[19] However, it is clearly objectionable for a union to explicitly buy votes by giving employees cash payments. *52nd Street Hotel Associates, d/b/a Novotel New York*, 321 NLRB 624, 634 (1996). Indeed, in *General Cable Corp*., 170 NLRB 1682 (1968), the Board found that a $5 gift certificate given to all employees for the purpose of inducing union support was objectionable.

With regard to the Employer's Objection No. 8, concerning the alleged payment of $10 to $50 to vote for Local 342, the evidence shows that during the critical period, the Union offered an employee witness $10 to $50 if s/he voted for the Union. In my view, such conduct, if true, may warrant setting aside the election. See, e.g. *Revco D.S., Inc. (DC) v NLRB*, 830 F.2d

[19] See *Lawrence Security, Inc*., 210 NLRB 1048 (1974) (where a union's offer to pay parking fees incurred by employees while they voted and its payment of such fees for those employees who took advantage of the offer did not constitute objectionable conduct); *Federal Silk Mills*, 107 NLRB 876 (1954) (where a union's payment of three dollars to employees for their expenses in driving other employees to the polling place did not warrant setting aside the election.) See also, *Gulf States Canners, Inc*., 242 NLRB 1326 (1979) (where the union announced its offer to provide free gas to employees who transported other employees to union meetings and/or campaigned on behalf of the union at their fellow employees' homes, and thereafter provided free gas to two employees for this purpose, the Board held that such conduct was unobjectionable.)

70, 72 (6th Cir. 1987) (offer to pay employee $100 to vote for the union found objectionable). Here, although there appears to be insufficient evidence to establish the actual monetary payment in exchange for a vote favorable to the Union, the offer of the economic inducement is as objectionable as the actual payment because of its reasonable tendency to influence the outcome of the election. Thus, the specifics of the actual payment need not be shown. See, e.g. *Broward County Health Corp., d/b/a Sunrise Rehabilitation Hospital*, 320 NLRB 212 at fn. 9 (1995). Compare *Dart Container of California*, 277 NLRB 1369 (1985).

In view of the foregoing, and inasmuch as there are substantial and material issues, including issues of fact and credibility that would be best resolved at hearing, I direct that a hearing be held before a hearing officer concerning the Union's alleged offer to pay employees $10 to $50 for voting for the Union and the actual payment to employees who took advantage of the latter offer, encompassed by Objection No. 8.

With respect to Objection No.9, alleging that the Employer distributed copies of the work schedule of employees of the Bronx store, Local 890's evidence shows that two Local 342 delegates were overheard saying, "they made copies of the list that was given to them." Local 890 also contends that the work schedule is posted in the store and only held by managers. In my view, Local 890's evidence is insufficient to establish that the Employer gave local 342 a copy of the work schedule. However, even assuming that the Employer gave the work schedule to the Local 342 agents, in my view, such conduct is not impermissible and I overrule Objection No. 9.

SUMMARY AND DETERMINATIONS

In summary, I have directed that a hearing be held concerning Local 890's Objection Nos. 1(a), 1(b), the portion of Objection 2 pertaining to threats, 3, 4, 5, 7 and 8. I have overruled

Objection Nos. 1(c), 1(d), the portion of Objection 2 pertaining to the distribution of liturature, 6, and 9.

Accordingly, pursuant to the authority vested in the undersigned Acting Regional Director by the National Labor Relations Board, herein called the Board,

IT IS HEREBY ORDERED that a hearing be held before a duly designated Hearing Officer with respect to the issues raised by Objection Nos. 1(a), 1(b), the portion of Objection 2 pertaining to threats, 3, 4, 5, 7 and 8, as described above.

IT IS FURTHER ORDERED that the Hearing Officer designated for the purpose of conducting such hearing shall prepare and cause to be served upon the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board, as to the issues raised. Within fourteen (14) days from the date of the issuance of such report, any party may file with the Board, an original and seven copies of Exceptions to the report, with supporting briefs, if desired. Immediately upon the filing of such Exceptions, the party filing the same shall serve a copy thereof, together with a copy of any brief filed, upon the other parties. A statement of service shall be made to the Board simultaneously with the filing of Exceptions. If no Exceptions are filed thereto, the Board, upon the expiration of the period for filing such Exceptions, may decide the matter forthwith upon the record or make any other disposition of the case.

PLEASE TAKE NOTICE that on July 8, 2004, at 9:30 a.m., and on consecutive days thereafter until concluded, at One MetroTech Center North, 10th Floor, Brooklyn, New York, a hearing will be conducted before a Hearing Officer of the National Labor Relations Board on the issues set forth in the above Supplemental Decision, at which time and place the parties will have the right to appear in person, or otherwise, to give testimony.

REQUEST FOR REVIEW

Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, Series 8, as amended, a request for review of this Supplemental Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, D.C. on or before July 16, 2004.[20]

Dated at Brooklyn, New York, on this 2nd day of July, 2004.

_____

John J. Walsh
Acting Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

[20] Under the provisions of Section 102.69(g) of the Board's Rules and Regulations, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections and which are not included in the Acting Regional Director's Supplemental Decision are not part of the record before the Board unless appended to the exceptions or opposition thereto which the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Regional Director's Supplemental Decision shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding.